**CHEONG MOE LEONG & ANOR**

**v.**

**WAKIL DIRI SAW GAIK BEOW (SIMATI)**

HIGH COURT MALAYA, PULAU PINANG
SU GEOK YIAM JC
[ORIGINATING SUMMONS NO: 24-299-2002]
14 MAY 2003

***LAND LAW:*** *Transfer - Fitness of instrument - Allegation of non-payment of balance price in relation to property - Whether true - Whether transfer of property void - Whether O. 45 r. 10, Rules of the High Court 1980 applicable*

***LAND LAW:*** *Transfer - Limitation - Whether cause of action time barred pursuant to s. 6(3), Limitation Act 1953*

This was an originating summons filed by the plaintiffs for declaratory reliefs and consequential orders against the defendants in respect of a piece of property arising from a judgment of the High Court dated 6 June 1989 (the 'said judgment'). Pursuant to the said judgment, the plaintiffs were ordered, *inter alia*, to execute a valid and registrable transfer of the said property in favour of one Saw, since deceased. The plaintiffs' case in this instance was that Saw did not fulfil a condition of the said judgment because she had failed to effect payment of the balance price in relation to the property within a certain period. Therefore, the plaintiffs argued that the defendants were deemed to have abandoned the benefit of the said judgment under O. 45 r. 10 of the Rules of the High Court 1980 ('RHC').

**Held:**

**[1]** The said judgment was conditional upon saw paying into court a balance purchase price within a certain period. O. 45 r. 10 of the RHC provides that the fulfilment of this condition is a necessary prerequisite to relief. However, the fact that the property had already been transferred to Saw, implied that Saw had already complied with the condition as to payment into court of the said balance purchase price within the stipulated period. (p 444 b-d)

**[2]** The situation envisaged by O. 45 r. 10 of the RHC was not applicable in this instance. This was because the defendants were not seeking to obtain the benefit of the said judgment by asking the court to allow them to enforce the said judgment, ie that the plaintiffs comply with the order in the said judgment so that the property be transferred to the defendants. This was due to the reason that the property had already been transferred to the defendants. (p 444 d-f)

**[3]** Any contention by the plaintiffs that the transfer of the property and its subsequent registration was void, was without merits. The documentary evidence showed that the transfer was made in accordance with the said judgment. (p 445 d-e)

**[4]** It was not possible that the plaintiffs would have executed the memorandum of transfer and also handed over the issue document of title in favour of Saw if the balance of the purchase price had not been paid by Saw. It was insufficient for the plaintiffs to merely allege non-payment by Saw. The burden of proof was on the plaintiffs to prove its assertions and the plaintiffs had failed to discharge that burden. (pp 445 f-g & 446 e)

**[5]** Furthermore, the plaintiffs were guilty of inordinate delay and that the plaintiffs' cause of action was time barred pursuant to s. 6(3) of the Limitation Act 1953. (p 447 a-b)

*[Claim dismissed.]*

**Case(s) referred to:**
*Saw Gaik Beow v. Cheong Yew Meng & Ors [1989] 3 MLJ 301 HC* ***(refd)***
*Talbot v. Blindell & Ors [1908] 2 KB 114* ***(dist)***

**Legislation referred to:**
Contracts Act 1950, s. 26
Evidence Act 1950, ss. 101, 102
Limitation Act 1953, s. 6(3)
National Land Code, s. 340(2)(b)
Rules of the High Court 1980, O. 7 r. 2(1A), O. 45 r. 10

*For the plaintiffs - Karen Lai; M/s Shearn Delamore & Co*
*For the defendants - Darshan Singh Khaira; M/s Darshan Singh & Co*

*Reported by Raja Vishnu Sivarajah*

## JUDGMENT

**Su Geok Yiam JC:**

This is an application *vide* an originating summons filed on 7 February 2002 (encl. (2)) by the plaintiffs for declaratory reliefs and consequential orders against the defendants in respect of a piece of property arising from a judgment of the High Court dated 6 June 1989 in Penang High Court Civil Suit No. 571 of 1978.

The facts and background of the plaintiffs' application are as follows:

At all material times and prior to 27 December 1990, the plaintiffs were the registered proprietors of a piece of land, Lot No. 359, Section 10, Timur Laut District, Georgetown together with the premises thereon known as No. 11-A, Perak Garden, 10150 Penang held under grant No. 11775 (hereinafter referred to as "the said property") in equal undivided shares.

On 8 November 1978, one Saw Gaik Beow, since deceased, (hereinafter referred to as "the said Saw Gaik Beow") commenced proceedings *vide* Penang High Court Civil Suit No. 571 of 1978 (hereinafter referred to as "the said civil suit") against Cheong Yew Meng, the father of the plaintiffs, and the plaintiffs claiming for the subject property to be transferred to her pursuant to an alleged agreement entered into on or about 2nd April 1964.

On 6 June 1989, Edgar Joseph Jr. J (now FCJ (rtd.)) allowed the said Saw Gaik Beow's claim in the said civil suit and ordered judgment (hereinafter referred to as "the said judgment") as follows:

(1) that the alleged agreement dated 2 April 1964 constituted an agreement binding upon the plaintiffs;

(2) that upon payment of the balance purchase price less real property gains tax (if any) ("the said balance purchase price") by the said Saw Gaik Beow into court within 14 days from the date of the said judgment ("the said period") the agreement be specifically performed by the plaintiffs by executing a valid and registrable transfer of the said property in favour of the said Saw Gaik Beow;

(3) that upon payment of the said balance purchase price the plaintiffs were to deliver or cause to be delivered to the said Saw Gaik Beow or her solicitors the issue document of title of the said property.

The reasons for the said judgment are set out in *Saw Gaik Beow v. Cheong Yew Meng & Ors.* [1989] 3 MLJ 301.

On 19 June 1989, the plaintiffs filed a notice of appeal *vide* Supreme Court Civil Appeal No: 02-250-89 to the then Supreme Court against the whole of the said judgment dated 6 June 1989.

On 27 August 1990, the plaintiffs' notice of appeal was heard and dismissed by the then Supreme Court.

On 27 December 1990, the memorandum of transfer dated 2 October 1990 ("the said memorandum of transfer") in respect of the said property was registered ("the said registration") in favour of the said Saw Gaik Beow and the second defendant in one-half undivided share each.

On 18 November 1992, after the death of the said Saw Gaik Beow, her one-half undivided share of the said property was transferred to the 3rd defendant ("the subsequent transfer") in accordance with a distribution order dated 7 October 1992 and registered, accordingly.

On 7 February 2002, the plaintiffs filed this application. In this application the plaintiffs are seeking, *inter alia*, the following reliefs:

(1) a declaration that the said Saw Gaik Beow had failed to effect payment of the said balance purchase price into court within the said period;

(2) a declaration that the said memorandum of transfer and the said registration in favour of the said Saw Gaik Beow and the 2nd defendant and the subsequent transfer in favour of the 3rd defendant are void for want of consideration and/or breach of the said judgment;

(3) an order that the said memorandum of transfer, the said registration and the subsequent transfer be set aside forthwith;

(4) an order that the 2nd and 3rd defendants in their capacity as the registered proprietors of one half undivided share each of the said property do execute a valid and registrable memorandum of transfer of the said property in favour of the plaintiffs in equal shares and do transmit the duly executed memorandum of transfer together with the issue document of title in respect of the said property to the plaintiffs' solicitors within 14 days from the date of the order of court herein; and

(5) that the defendants do pay the costs of the proceedings.

On 14 April 2002, after hearing and considering the oral and written submissions of Miss Karen Lai, learned counsel for the plaintiffs, and the oral submissions of Mr. Darshan Singh Khaira, learned counsel for the defendants, the court dismissed encl. (2) with costs ("the said order").

The reasons why the court made the said order are as follows:

To begin with, contrary to O. 7 r. 2(1A) of the Rules of the High Court 1980 ("the RHC") which expressly requires the particular rule of court and provisions of written law under which the court is being moved to be stated, nowhere is it stated in the intitulement to the originating summons any law or any order let alone a specific provision or rule as the case may be of the relevant written law or the RHC which the plaintiffs are relying on.

The court noted that it is stated in para. (ii) of the plaintiffs originating summons and para. 14 of the plaintiff's affidavit-in-support (encl. (1)) affirmed on 6 February 2002 that the said memorandum of transfer is void for want of consideration and/or in breach of the said judgment. The court also noted that it is stated in para. 15 of the plaintiff's affidavit-in-support that the said registration is bad and invalid in law. The court further noted that in para. 18 of the plaintiff's affidavit-in-support it is stated that the said Saw Gaik Beow "in failing to abide by the terms and conditions of the said judgment of the High Court had not only been in breach of the said judgment of the High Court but in law is deemed to have abandoned the benefit of the said judgment of the High Court and that accordingly, the transfer and registration in respect of the said property are void in law and have no legal standing or effect whatsoever".

However, it was only in the plaintiffs' written outline of submissions dated 14 October 2002 that it is stated for the very first time that the plaintiffs are seeking to rely on O. 45 r. 10 of the RHC, s. 340(2)(b) of the National Land Code 1965 ("the NLC") and s. 26 of the Contracts Act 1950 ("the Contracts Act").

**Order 45 r. 10 Of The RHC**

Order 45 r. 10 of the RHC provides as follows:

> **Conditional judgment: Waiver (O. 45 r. 10)**
>
> A party entitled under any judgment or order to any relief subject to the fulfillment of any condition who fails to fulfil that condition is deemed to have abandoned the benefit of the judgment or order, and, unless the court otherwise directs, any other person interested may take any proceedings which either are warranted by the judgment or order or might have taken if the judgment or order had not been given or made.

In respect of O. 45 r. 10 of the RHC it is the plaintiffs' case that the said Saw Gaik Beow did not fulfil a condition of the said judgment in the said civil suit because she had failed to effect payment of the said balance price in respect of the said property within the said period. Miss Karen Lai submits that, therefore, the defendants are deemed to have abandoned the benefit of the said judgment pursuant to O. 45 r. 10 of the RHC.

It is clear from the said judgment that the said judgment was a conditional one in that the said Saw Gaik Beow could only obtain the benefit of the said judgment if the said Saw Gaik Beow had paid into court the said balance purchase price within 14 days from the date of the said judgment. Order 45 r. 10 of the RHC provides that the fulfillment of this condition is a necessary prerequisite to relief. In my judgment, the fact that the said property has already been transferred to the said Saw Gaik Beow and the 2nd defendant and upon the demise of the said Saw Gaik Beow, her one-half undivided share had been transferred to the 3rd defendant implies that the said Saw Gaik Beow had already complied with the condition as to payment into court of the said balance purchase price within the said period.

In my judgment, the situation envisaged by O. 45 r. 10 of the RHC is different from the situation in the instant case. In the instant case, the defendants are not seeking to obtain the benefit of the said judgment by asking the court to allow them to enforce the said judgment, to wit, that the plaintiffs comply with the order in the said judgment that the said property be transferred to them and the issue document of title be delivered to the said Saw Gaik Beow. The reason is because the said property has already been transferred to the defendants. That is the benefit of the judgment which was obtained by the said Saw Gaik Beow in the said civil suit. In my judgment the submission of Miss Karen Lai that the defendants have abandoned the benefit of the judgment is, therefore, without merits.

The English case of *Talbot v. Blindell and Ors* [1908] 2 KB 114 is distinguishable on its facts. In that case the plaintiff, Miss Talbot, brought an action for possession, as lessor against the defendants, the representatives of the lessee of a coal mine. Walton, J decided that she was entitled to re-enter upon the coal mine on the ground of forfeiture of the lease by breaches of covenant. Subsequently, the defendants applied to the court for relief against the order of forfeiture. The court granted the relief subject to the defendants doing three things. However, the defendants having performed part of the conditions declined to perform the remainder and desired to waive the relief. Walton, J held that the court had no power to compel the defendant to perform the conditions and that the order for relief must, therefore, be treated as abandoned.

In this case, the defendants are not seeking to abandon or waive the relief which was sought by the said Saw Gaik Beow in the said civil suit. Neither are the plaintiffs saying that the defendants have abandoned or waived the relief because the plaintiffs have not transferred the said property to the said Saw Geok Beow and the said Saw Geok Beow has not fulfilled the condition which requires her to pay the said balance purchase price within the said period.

**Section 340(2)(b) Of The NLC And S. 26 Of The Contracts Act**

In respect of s. 340(2)(b) of the NLC and s. 26 of the Contracts Act, Miss Karen Lai submits that the memorandum of transfer dated 2 October 1990 in respect of the said property between the plaintiffs and the said Saw Gaik Beow and registered by the Pendaftar Hakmilik Tanah, Pulau Pinang, are void for want of consideration as provided for in s. 26 of the Contracts Act and therefore the transfer and the subsequent registration have been effected by means of an insufficient or void instrument.

In my judgment, there is nothing in the copy of the Form 14A of the NLC exhibited as "CML2" in the plaintiffs' affidavit-in-support to indicate or even suggest that the said balance purchase price has not been paid in the manner as stated in the said judgment. On the contrary, it is expressly stated on p. 1 of "CML2" under the caption "sebagai balasan" that the transfer was made in accordance with the said judgment as the words used are "menurut perintah Mahkamah Tinggi (1) Pulau Pinang Guaman Sivil No: 571 Tahun 1978 bertarikh 21hb Oktober, 1989 Jilid 30 Folio 32".

Therefore, the contention of the plaintiffs that the transfer is void for want of consideration and the subsequent registration of the transfer is void because it was effected by means of an insufficient or void instrument is without merits.

The court accepts the defendants' contention that it is not possible that the plaintiffs would have executed the memorandum of transfer in favour of the said Saw Gaik Beow and also handed over the issue document of title to the said Saw Gaik Beow if the said balance of the purchase price had not been paid by the said Saw Gaik Beow. On the balance of probabilities the court rules in favour of the defendants. This is because the burden of proof is on the plaintiffs and the plaintiffs have failed to discharge that burden.

Section 101 of the Evidence Act 1950 provides as follows:

**101. Burden of proof.**

(1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

**ILLUSTRATIONS**

(a) ...

(b) A. desires a court to give judgment that he is entitled to certain land in the possession of B. by reason of facts which he asserts and which B. denies to be true.

A. must prove the existence of those facts.

Illustration (b) to s. 101 applies to the facts in the instant case. Here the plaintiffs desire the court to give judgment that they are entitled to the said property in the possession of the 3rd defendant by reason of facts which they assert in their originating summons and affidavit and which the defendants deny to be true.

Section 102 of the Evidence Act 1950 expressly stipulates that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. It is insufficient for the plaintiff to merely allege non-payment by the said Saw Gaik Beow. There is no affidavit from the plaintiffs' previous solicitors who were handling the matter to state that the said balance purchase price was not paid by the said Saw Gaik Beow. There is also no affidavit from the plaintiffs' current solicitors stating that they had done a search on the court file pertaining to the said civil suit and the search showed that there was no such payment made into court. Exhibit "CML2" shows that the plaintiffs' previous solicitor was Johari bin Ahmad. In my judgment, the plaintiffs should have filed an affidavit affirmed by Johari bin Ahmad in support of the plaintiffs' claim.

The court also rejected the plaintiffs' contention as to fraud and/or misrepresentation as set out in para. 6(viii) of the plaintiffs' further affidavit affirmed on 5 July 2002 and filed on the same day (encl. (5)) as no particulars of the alleged fraud and/or misrepresentation were forthcoming.

Finally, even assuming for a moment that the court is wrong in holding that the plaintiffs' claim is without merits, the court is satisfied that the plaintiffs' are guilty of inordinate delay and that the plaintiffs' cause of action, is time barred pursuant to s. 6(3) of the Limitation Act 1953 as more than 12 years have elapsed since 20th June 1989 which is the last date for the payment of the said balance purchase price by the said Saw Gaik Beow into court.

In the premises, the court dismissed the plaintiffs' claim with costs.